

**NC** JUN 03 2002  
Michael N. Milby, Clerk



Consolidated Lead No. H-01-3624 ✓

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Civil Action No. G-02-0299

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alleges violations of the Texas Securities Act, statutory fraud, and causes of action under the common law of Texas.

JPM filed a Notice of Removal on May 6, 2002. JPM does not assert diversity jurisdiction but claims this Court has federal-question subject matter jurisdiction based upon (1) “supplemental jurisdiction” pursuant to the general jurisdictional and removal statutes, 28 U.S.C. §§ 1367 and 1441; (2) federal preemption under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 78, 105 P.L. 353, 112 Stat. 3227 (“SLUSA”); and (3) bankruptcy jurisdiction under 28 U.S.C. §§ 1334 and 1452. *See Removal Notice* ¶ 5.

All three of JPM’s removal theories are frivolous. First, JPM attempts to turn the supplemental jurisdiction statute on its head by arguing that 28 U.S.C. §§ 1441 and 1367 allow removal of state law claims even when no federal question is raised in Plaintiffs’ petition; that is, JPM would do away with the well-pleaded complaint rule. Second, JPM improperly asserts SLUSA preemption because Plaintiffs’ action plainly is not a “covered class action,” pursuant to the clearly-defined scope of SLUSA; the action is thus not subject to federal preemption. Third, JPM’s bankruptcy jurisdiction argument is a red herring because the controversy between Plaintiffs and JPM does not concern the same questions of fact or law as, and will not impact, Enron’s bankruptcy proceeding; under JPM’s bankruptcy jurisdiction theory, the entire *Newby* action should immediately be transferred to the New York bankruptcy court where Enron’s bankruptcy is pending.

### JPM HAS THE BURDEN OF ESTABLISHING FEDERAL JURISDICTION

The removing party carries the burden of establishing the existence of federal jurisdiction. *Figueroa v. Healthmark Partners, L.L.C.*, 125 F.Supp. 2d 209, 210 (S.D. Tex. 2000) (citing *Hummel v. Townsend*, 883 F.2d 367, 369 (5th Cir. 1989); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. Unit A Dec. 1981)). *See also Kidd v. Southwest Airlines Co.*, 891 F.2d 540, 543 (5th Cir. 1990) (because defendant is party seeking removal, defendant has burden of showing federal jurisdictional requirements are met). “[A]ny doubts surrounding removal must be resolved in favor of remanding the action to state court.” *Figueroa*, 125 F.Supp. 2d at 210. (citing *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 339 (5th Cir.), *cert. denied*, 120 S.Ct. 2658, 147 L.Ed. 273 (2000)). *See also Clinton v. Hueston*, 308 F.2d 908, 910 (5th Cir. 1962). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. *Figueroa*, 125 F.Supp. 2d at 210 (citing 28 U.S.C. § 1447(c)).

JPM, the removing party, fails to meet its burden. The three theories JPM proposes as bases for removal, moreover, are frivolous because they have no basis in the law and do not raise good faith arguments for extension of existing law.

### THERE CAN BE NO SUPPLEMENTAL JURISDICTION IN THIS CASE

“A state court action asserting only state law claims is not removable unless the plaintiff’s state law claims are preempted by federal law or the defendant is entitled to assert the defense of *res judicata* or a similar defense.” *Pointer v. Crown, Cork & Seal Co.*, 791

F.Supp. 164, 167 (S.D. Tex. 1992). Plaintiffs in this action assert only state law claims and JPM does not assert *res judicata* or any similar defense. There is, consequently, no basis for supplemental jurisdiction.<sup>1</sup>

JPM asserts an outlandish new theory that supplemental jurisdiction over American National's state law action can be based upon a federal claim asserted by a completely different plaintiff, asserting different causes of action,<sup>2</sup> in a different case, in a different court. This proposal to widely expand federal subject matter jurisdiction by jettisoning the well-pleaded complaint rule should be quickly rejected because it contravenes well-established law:

A defendant may remove a state court action to federal court only if the action could have been originally filed in federal court. 28 U.S.C. § 1441(a); *Caterpillar v. Williams*, 482 U.S. 386, 391-92, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); *Wallace v. Ryan-Walsh Stevedoring Co.*, 708 F.Supp. 144, 150 (E.D. Tex. 1989). Where, like this case, there is no diversity jurisdiction, a federal question must exist for removal to be proper. *Caterpillar*, 482 U.S. at 392, 107 S.Ct. at 2429; *Rheams v. Bankston, Wright & Greenhill*, 756 F.Supp. 1004, 1008 (W.D. Tex. 1991). Whether a federal question exists depends upon the well-pleaded complaint rule, which provides that the plaintiff's complaint governs the jurisdictional determination. *Caterpillar*, 482 U.S. at 392, 107 S.Ct. 2429; *Cedillo v. Enter.*, 773 F.Supp. 932, 934 (N.D. Tex. 1991). If the complaint, on its face, contains no issue of federal law, then there is no federal question jurisdiction. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983); *Rheams*, 756 F.Supp. at 1008.

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<sup>1</sup> JPM's SLUSA preemption and bankruptcy jurisdiction arguments are discussed *infra*.

<sup>2</sup> JPM's Notice of Removal does not enumerate the facts "common" to the Plaintiffs action and the so-called "Enron Securities Case" and further fails to specify the causes of action raised in the "Enron Securities Case" except to say there are "numerous securities fraud cases." *Removal Notice* ¶ 11. Contrary to JPM's implications, the state law causes of action asserted by Plaintiffs are not identical to claims brought under federal securities laws by the *Newby* plaintiffs.

*Galveston Linehandlers, Inc. v. International Longshoreman's Ass'n, Local # 20*, 140 F.Supp.2d 741, 744-45 (S.D. Tex. 2001).

American National alleges only state law claims in its Petition. As a consequence, there is no federal question to serve as the “hook” for removing pendant state law causes of action. See *Louisville & Nashville Railway Co. v. Mottley*, 211 U.S. 149 (1908); *A.I. Trade Finance, Inc. v. Petra Int’l Banking Corp.*, 62 F.3d 1454, 1459 (D.C. App. 1995) (question of federal law must appear on the face of well-pleaded complaint). JPM cites no authority which supports the unprecedented proposition that supplemental jurisdiction may be invoked over a plaintiffs’ state law claims based upon a federal claim brought by another plaintiff, asserting different claims, in another court. The two decisions cited by JPM in support of its novel “supplemental jurisdiction” argument, *United Mine Workers v. Gibbs*, 86 S.Ct. 1130, 1138 (1966) and *Newby v. Arthur Andersen*, No. H-01-3624, Memorandum and Order (S.D. Tex., Feb. 6, 2002) (*See Removal Notice* ¶¶ 11, 12) actually establish that JPM’s argument is frivolous.

Defendant cites *Gibbs* for the proposition that “the relationship between the [federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.” *Removal Notice* ¶ 5. *Gibbs*, however, concerned state and federal claims asserted by the same plaintiff in a single action. The Supreme Court held that the district court may exercise pendant (supplemental) jurisdiction over state law claims in situations where the court has jurisdiction over the federal claims alleged in that plaintiff’s complaint. Nothing in *Gibbs* implies that the well-pleaded complaint rule should

be rejected such that supplemental jurisdiction may be exercised based upon a federal question raised by some other plaintiff in another lawsuit. To the contrary, *Gibbs* requires that the federal claim appear on the face of a plaintiff's complaint. *See, e.g., Coates v. Illinois State Board of Edu.*, 559 F.2d 445, 451 (7<sup>th</sup> Cir. 1977) (citing *Gibbs*, "Because no federal claim has been asserted, we, of course, have no power to retain jurisdiction over any putatively well-pleaded state action . . .")

The *Newby/Coy* Memorandum and Order, entered February 6, 2002, which denied remand of an action brought by William Coy and Candy Mounter, Individually and on Behalf of All Similarly Situated Stockholders of Enron Corporation, clearly rejects JPM's theory of "supplemental jurisdiction" over American National's claims. In *Coy*, the Court did not invoke supplemental jurisdiction and deny remand based upon federal claims asserted by other plaintiffs in another action. Rather, the decision was based upon the federal claims found in the *Coy* plaintiffs' petition. The Court first determined that the *Coy* action, which is styled as a class action, was a "covered class action" under SLUSA and thus preempted. As a result of SLUSA preemption, the *Coy* securities fraud claims were, in fact, federal claims because a claim purportedly based on a pre-empted state law is considered a federal claim arising under federal law. *See MRS Exploration, Ltd. V. Meridian Oil, Inc.*, 74 F.3d 910, 912 (9<sup>th</sup> Cir. 1996). The Court then determined that the remaining state law claims were similar to, and amenable to consideration in conjunction with, the federal claims such that the exercise of supplemental jurisdiction over the state law claims was appropriate.

The Court, in other words, did not deny remand base upon similarity of the *Coy* claims and the *Newby* (referred to by JPM as the “Enron Securities Case”) claims, as JPM implies. Rather, the Court expressly concluded, “If there are only viable state law claims to which SLUSA is inapplicable, the suit should be remanded.” Memorandum and Order at 7.

### SLUSA DOES NOT PREEMPT PLAINTIFFS’ CLAIMS

The preemption provisions of SLUSA do not allow preemption and removal of American National’s action. JPM’s theory of SLUSA preemption conflicts with established law and contravenes Congressional intent.

It is well settled that federal law does not enjoy complete preemptive force in the field of securities; state securities laws exist in every state, the District of Columbia, and Puerto Rico, and far from preempting the field, Congress has expressly reserved the role of states in securities regulation. *See Green v. Fund Asset Management, L.P.*, 245 F.3d 214, 223 n.7 (3d Cir. 2001); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1107 (4th Cir. 1989) (*en banc*). It is also clear from the language of the House Report that SLUSA does not preempt all state law in the field of securities. *Riley v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 168 F.Supp.2d 1352, 1356 (M.D. Fla. 2001) (citing H.R.CONF. REP. 105-803). Rather, SLUSA bars a specific form of action based on a specific set of facts, namely a class action arising under the enumerated circumstances described in SLUSA. *Id.* (citation omitted). Federal Securities law expressly provides, “The operative language in SLUSA

poses no bar to pursuit of individual actions regarding securities in state courts, or to class actions which fall outside the limitations of 15 U.S.C.A. § 78bb(f).” *Id.*

The contours of SLUSA, thus, are limited and the preemption provision of SLUSA does not federalize all actions relating to the purchase or sale of securities. Instead, SLUSA only provides for removal of certain actions under state law where a sufficient number of plaintiffs allege facts actionable under federal securities laws. Specifically, SLUSA authorizes the removal and dismissal of a (1) “covered class action”; (2) based on state law; (3) that either alleges a misrepresentation or omission of a material factor that the defendant used, or employed a manipulative or deceptive device or contrivance with regard to the purchase or sale; (4) of a “covered security.” 15 U.S.C. § 78 bb(f). *See also Wald v. C.M. Life Ins. Co.*, 2001 U.S. Dist. Lexis 2593 (W.D. Tex. 2001).

American National’s lawsuit is not preempted because it is not a “covered class action” under SLUSA:

B. Covered class action. The term “covered class action” means –

(i) any single lawsuit in which –

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or  
(II) one or more named plaintiffs seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class

predominate over any questions affecting only individual persons or members; or

- (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which –

- (I) damages are sought on behalf of more than 50 persons; and
  - (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5).

There are eight individual Plaintiffs in this action.<sup>3</sup> None of the Plaintiffs seek damages on behalf of other unnamed parties similarly situated and the action was not consolidated by the state court with any other pending actions. Plaintiffs' lawsuit, pursuant to SLUSA and the well-pleaded complaint rule, is not a "covered class action."

JPM devotes but one short paragraph of its Remand Notice to the question of how American National's action could be considered a "covered class action" under SLUSA despite the fact that this is the only critical issue in determining whether American National's claims are preempted. JPM attempts to circumvent the plain language of 78bb(f)(5)(B) by alleging, in conclusory fashion, that "this case is a covered class action because Plaintiffs, when joined and properly consolidated with the other Enron-related litigation in this District, form a covered class of more than 50 plaintiffs as defined by SLUSA." *Removal Notice* ¶ 16.

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<sup>3</sup> For the purpose of counting the number of persons or prospective class members, a corporation, investment company, pension plan, partnership or other entity, shall be treated as one person or prospective class member, so long as the entity is not established for the purpose of participating in the action. 15 U.S.C. § 78bb(f)(5)(D).

JPM, however, fails to explain how, or cite any authority supporting its proposition that, American National's claims and the *Newby* claims can be "joined" by the federal court. The reason for JPM's failure to squarely address the issue is simple: consolidating various state actions by a federal court for the purpose of creating a 50-plus plaintiff class is expressly prohibited by SLUSA.<sup>4</sup> Nothing in SLUSA "shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be consolidated, or otherwise allowed to proceed as a single action." 15 U.S.C. § 78bb(f)(5)(F).

That the provisions of section 78bb(f)(5)(F) prohibit a federal court from declaring American National's action part of a federal SLUSA action was recently confirmed in *Bullock v. Arthur Andersen*, A-02-CA-070-H, Order of Remand (W.D. Tex. 2002)(Attached as Exhibit A). The theory of SLUSA preemption asserted by Arthur Andersen in *Bullock* is identical to the theory asserted in JPM's Removal Notice. In *Bullock*, the court considered, analyzed and rejected the argument that the federal district court may disregard the well-pleaded complaint rule to create a SLUSA "covered class action" where, as here, on the face of the petition and in accord with the action's posture in state court, the action was not subject to SLUSA preemption. In short, JPM's contention that SLUSA preempts any or all of American National's claims is in contravention of clearly established law and must be rejected.

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<sup>4</sup> Arthur Andersen, which in the past has argued that individual actions could be consolidated by the federal court to create a SLUSA class, recently conceded that "SLUSA merely prohibits plaintiff from pursuing a class action while preserving his ability to pursue an individual action under state law." *Arthur Andersen LLP's Response to Blaz Plaintiff's Motion for Remand* at 2.

## PLAINTIFFS' ACTION IS NOT SUBJECT TO BANKRUPTCY JURISDICTION

JPM's third purported ground for removal, bankruptcy jurisdiction pursuant to 28 U.S.C. ¶¶ 28 U.S.C. §§ 1334(b) and 1452(a), fares no better than the allegations of "supplemental" jurisdiction and SLUSA preemption. Under JPM's logic, the *Newby* action should long ago have been transferred to the Southern District of New York for consolidation with Enron's pending bankruptcy proceeding.

JPM first argues that bankruptcy jurisdiction is appropriate because "the Southern District Bankruptcy Court has amassed substantial knowledge and experience in Enron-Related matters", has "managed a myriad of parties," has "held over 100 hearings," and has "issued over 300 orders." *Removal Notice* ¶ 19. How this relates to federal bankruptcy jurisdiction over American National's action, however, is not explained. To the extent JPM contends that the bankruptcy court's familiarity with Enron-related issues is dispositive, it is well established "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of [§ 1334(b)]." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). *See also In re Zale Corp.*, 62 F.3d 746, 753 n.21 (shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action "related to" the bankruptcy).

JPM next alleges that American National's action is "related to" the Enron bankruptcy proceeding because JPM "may have an action against Enron for indemnity or contribution..."

*Removal Notice* ¶ 21. JPM argues that, as a result of a potential contribution claim against Enron, American National's action could conceivably have an effect on the estate being administered in bankruptcy. *Removal Notice* ¶ 20. If indeed this were the case, however, the *Newby* action -- which according to JPM allege the same kind of claims as alleged by American National -- should be transferred to the bankruptcy court. Further, JPM provides only conclusory allegations concerning the potential for contribution and indemnity claims and fails to analyze each of American National's claims and the relationship of each claim to the bankruptcy proceeding.

The Supreme Court has cautioned that a bankruptcy court's "related to" jurisdiction "cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). "As a dispute becomes progressively more remote from the concerns of the body of federal law claimed to confer jurisdiction over it, the federal interest in furnishing the rule of decision for the dispute becomes progressively weaker." *In re Zale Corp.*, 62 F.3d at 752 (quoting *In re Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 162 (7<sup>th</sup> Cir. 1994)). The Fifth Circuit, moreover, has noted that a large majority of cases reject the notion that bankruptcy courts have "related to" jurisdiction over third-party actions and has warned that an overbroad construction of section 1334(b) may bring into federal court matters that should be left for state courts to decide. *Id.* at 752-53. The causes of action brought by American National against JPM are so remote from the Enron bankruptcy issues that it is inconceivable American National's action could interfere with or impact the bankruptcy proceedings.

JPM contends that American National's action may affect the bankruptcy proceeding because JPM "may" have indemnity or contribution claims against Enron and other defendants "if" Enron and these other defendants were joined in the case. *See Removal Notice* ¶¶ 21, 22. Mere allegations that an action "may" affect the bankruptcy proceeding, however, are insufficient because there must be an actual nexus between particular state law claims and the bankruptcy proceeding. *See, e.g., Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770 (8<sup>th</sup> Cir. 1995).

JPM's contention (based upon "mays" and "ifs") is belied by that fact that Enron and other defendants are not parties to this action, JPM has not moved to join them in this action, and JPM has not stated that it intends to file third-party actions against them in this action. JPM, moreover, has not even attempted to demonstrate that such contribution or indemnity claims, even if they could be and were asserted, could conceivably affect administration of the bankrupt estate particularly in light of the large number of secured/priority creditors and the relative paucity of Enron assets. JPM's asserted nexus with Enron's bankruptcy is also belied by JPM's failure to seek transfer of the *Newby* action to the Southern District of New York.

JPM additionally fails to meet its burden of demonstrating that removal grounded on bankruptcy jurisdiction is proper because the Removal Notice provides no analysis of American National's claims. *See Halper v. Halper*, 164 F.3d 830, 838 (3d Cir. 1999) (to determine the extent of the bankruptcy court's jurisdiction in a case, each of the claims

presented must be examined to ascertain if it is core, non-core, or wholly unrelated to a bankruptcy case). Other than one reference (without analysis) to American National's claim under the Texas Securities Act, JPM does not mention, much less discuss or analyze, the causes of action asserted by Plaintiffs. The removing defendant has the burden of establishing which claim or claims are subject to federal jurisdiction. *See Kidd*, 308 F.2d at 910. *See also* 28 U.S.C. § 1367(c) (those claims not with federal subject matter jurisdiction may be remanded). JPM has not made the requisite showing and American National's action, accordingly, must be remanded.

American National, further and in the alternative, hereby moves the Court to abstain pursuant to 28 U.S.C. § 1334(c)(1) which provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

American National's action meets the criteria for mandatory abstention because: (1) American National is moving for abstention in a timely manner; (2) American National's action involves purely state law questions; (3) the action has been removed for purportedly being "related to" Enron's bankruptcy and not because the action is "arising in" or "arising under" title 11 bankruptcy; (4) there is no independent federal jurisdiction absent purported bankruptcy issues; (5) the action was commenced in state court; (6) the state court action may

be timely adjudicated; and (7) the state forum has appropriate jurisdiction over the claims. *See In re Engra*, 86 B.R. 890, 894 (Bankr. S.D. Tex. 1988); *In re Chiodo*, 88 B.R. 780, 786-87 (Bankr. W.D. Tex. 1988); *In re Bowen Corp.*, 150 B.R. 777, 782-786 (Bankr. D. Idaho); *In re Leco Enterprises, Inc.*, 144 B.R. 244, 250-51 (S.D.N.Y. 1992).

Additionally and/or in the alternative, American National moves the Court to abstain from hearing American National's action in the interest of comity with the Texas courts and respect for Texas state law. *See* 28 U.S.C. § 1334(c)(1). Remand of this action based upon either mandatory or permissive abstention is appropriate. *See Southmark Corp. v. Coopers & Lybrand*, 163 F.3d 925, 929 (5<sup>th</sup> Cir. 1999) (statutory abstention applies in the removal/remand context).

At heart and stripped of the speculative "what ifs," JPM's removal argument is quite simple: convenience favors consideration of American National's claims in federal court. Judicial economy alone, however, cannot justify a court's finding of jurisdiction. *See In re Zale Corp.*, 62 F.3d at 753-54 (citing *In re Boone*, 52 F.3d 958, 961 (11<sup>th</sup> Cir. 1995); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11<sup>th</sup> Cir. 1990); *In re Kubly*, 818 F.2d 634, 645 (7<sup>th</sup> Cir. 1987) ("Like other federal courts, a bankruptcy tribunal is one of limited jurisdiction. Its power must be conferred, and it may not be enlarged by the judiciary because the judge believes it wise to resolve the dispute"). A defendant's or "the district court's desire to 'foster and encourage and then preserve settlement in federal court' does not in and of itself

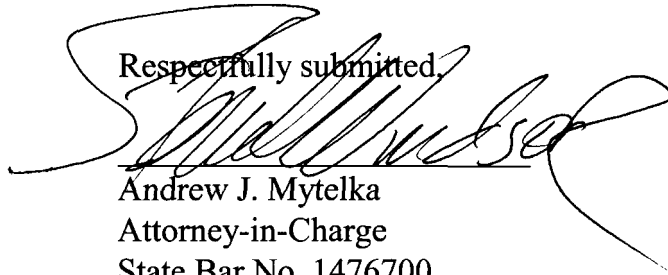
confer jurisdiction.” *In re Zale Corp.*, 62 F.3d at 754. American National’s action, accordingly, should be remanded to state court.

#### CONCLUSION AND PRAYER

JPM fails to meet its burden of demonstrating that this Court, or that the Enron bankruptcy court, has subject matter jurisdiction over Plaintiffs’ claims. Plaintiffs, therefore, pray that this case be remanded to state court.

Because all three theories for removal proposed by JPM are frivolous, Plaintiffs are entitled under 42 U.S.C. 1447(c) to fees and costs that would not have been incurred had the case remained in state court. *See Avitts v. Amoco*, 111 F.3d 30, 32 (5th Cir. 1997); *Breathwit*, 2001 U.S. Dist. Lexis 20111 at \*3-4 (awarding fees and costs because “the removability question is not sufficiently close”). Plaintiffs, accordingly, also pray for an award of such fees and costs.

Respectfully submitted,



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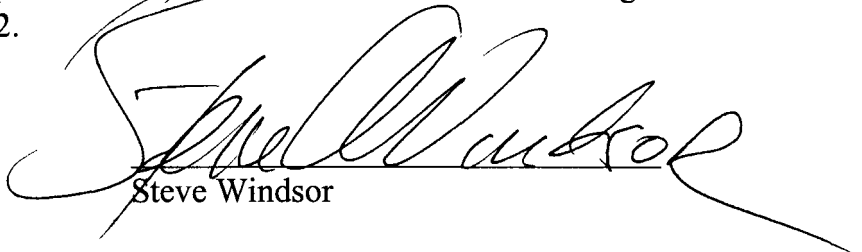
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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on all counsel listed in the Court's April 10, 2002 order by e-mail (PDF format) and also on counsel for J.P Morgan Chase & Company via fax May 31, 2002.



Steve Windsor

The Exhibit(s) May  
Be Viewed in the  
Office of the Clerk